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No. 04-547

Supreme Court, U.S.
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In The
Supreme Court of the United States

PAUL TRUNNELL,

Petitioner,

vs.

SUMMIT COUNTY, UTAH,
JAMES SORENSON & CONNIE SORENSON,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Utah

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I Does Summit County's strict compliance with Utah's statutory noticing requirements prior to a tax sale of real property violate the due process provisions of the Fifth and Fourteenth Amendments of the U.S. Constitution?

II Does the failure of the Petitioner/Plaintiff to perform a condition precedent under an oral contract, and subsequent rejection by Summit County of the contract, violate the principles of due process and equal protection granted under the Fifth and Fourteenth Amendments of the U.S. Constitution?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iii
Opinions Below	1
Constitutional Provisions	1
Statutory Provisions	2
Statement of the Case	8
Statement of Facts	9
Summary of Argument	12
Argument	13
I. Due Process	13
II. Notice	17
A. The personal notice to the property owner Mr. Trunnell, was proper	17
B. The personal notice to third party lienholders was proper	19
C. The personal notice to the occupant of the property was proper	22
III. Oral Agreement	23
Conclusion	23

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT DECISIONS:

Barrows v. Jackson, 346 U.S. 249, 97 L.Ed. 1586, 73 S.Ct. 1031 (1953) 20

Dusenbery v. U.S., 534 U.S. 161, 122 S.Ct. 694, 151 L.Ed.2d 597 (2002) 13, 14, 15, 16, 21

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) 19

Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706 (1983) 12, 15

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652 (1950) 14

U.S. v. James Daniel Good Real Property, 510 U.S. 43, 114 S.Ct. 492 (1993) 14

Warth v. Seldin, 422 U.S. 490, 45 L.Ed.2d 343, 95 S.Ct. 2197 (1975) 20

FEDERAL COURT DECISIONS:

Doyle v. Oklahoma Bar Ass'n, 998 F.2d 1559 (10th Cir. 1993) 20

Wiren v. Eide, 542 F.2d 757 (9th Cir. 1976) 22

UTAH COURT DECISIONS:

Hall v. NACM Intermountain, Inc., 1999 UT 97, P13, 988 P.2d 942 21

Midvale City Corp. v. Haltom, 2003 UT 26, 2003 Utah LEXIS 55 20

Trunnell v. Summit County, 2004 UT App 45, *cert. denied*, 94 P.3d 929 (2004) 1, 9, 17

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION AND STATUTES:

United States Constitution Amendment V..... 1, 13, 14

United States Constitution Amendment XIV..... 1, 13, 14

UTAH CODE § 59-2-1351 (1953).....*passim*

UTAH CODE § 59-2-1351.1 (1953)..... 4, 10

OPINIONS BELOW

The decision of the trial court is unreported. A copy is provided in the Petitioner's Brief as an appendix, pages a14 to a19.

The decision of the Utah Court of Appeals is unreported, but can be found in the public domain as *Trunnell v. Summit County*, 2004 UT App 45. A copy is provided in the Petitioner's Brief as an appendix, pages a3 to a13.

The decision of the Utah Supreme Court to deny certiorari is reported as *Trunnell v. Summit County*, 94 P.3d 292 (UT 2004). A copy is provided in the Petitioner's Brief as an appendix, pages a1 to a2.

CONSTITUTIONAL PROVISIONS

United States Constitution Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution Amendment XIV § 1:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

UTAH CODE § 59-2-1351

(1)(a) Upon receiving the tax sale listing from the county treasurer, the county auditor shall select a date for the tax sale for all real property on which a delinquency exists that was not previously redeemed and upon which the period of redemption is expiring in the nearest tax sale.

(b) The tax sale shall be conducted in May or June of the current year.

(2) Notice of the tax sale shall be provided as follows:

(a) sent by certified and first class mail to the last-known recorded owner, the occupant of any improved property, and all other interests of record, as of the preceding March 15, at their last-known address; and

(b) published four times in a newspaper published and having general circulation in the county, once in each of four successive weeks immediately preceding the date of sale; or

(c) if no newspaper is published in the county, posted in five public places in the county, as determined by the

auditor, at least 25 but no more than 30 days prior to the date of sale.

(3) The notice shall be in substantially the following form:

NOTICE OF TAX SALE

Notice is hereby given that on ___ (month\day\year), at __ o'clock __. m., at the front door of the county courthouse in ____ County, Utah, I will offer for sale at public auction and sell to the highest bidder for cash, under the provisions of Section **59-2-1351.1**, the following described real property located in the county and now delinquent and subject to tax sale. A bid for less than the total amount of taxes, interest, penalty, and administrative costs which are a charge upon the real estate will not be accepted.

(Here describe the real estate)

IN WITNESS WHEREOF I have hereunto set my hand and official seal on ___ (month\day\year).

_____

County Auditor

_____

County

(4)(a) The notice sent by certified mail in accordance with Subsection (2)(a) shall include:

(i) the name and last-known address of the last-known recorded owner of the property to be sold;

(ii) the parcel, serial, or account number of the delinquent property; and

(iii) the legal description of the delinquent property.

(b) The notice published in a newspaper in accordance with Subsection (2)(b) shall include:

(i) the name and last-known address of the last-known recorded owner of each parcel of property to be sold; and

(ii) the street address or the parcel, serial, or account number of the delinquent parcels.

UTAH CODE § 59-2-1351.1

(1)(a) At the time specified in the notice the auditor shall:

(i) attend at the place appointed, offer for sale, and sell all real property for which an acceptable bid is made; and

(ii) refuse to offer a parcel of real property for sale if the description of the real property is so defective as to convey no title.

(b) The auditor may post at the place of sale a copy of the published list of real property to be offered and cry the sale by reference to the list rather than crying each parcel separately.

(2)(a) The tax commission shall establish, by rule, minimum procedural standards applicable to tax sales.

(b) For matters not addressed by commission rules, the county legislative body, upon recommendation by the county auditor, shall establish procedures, by ordinance, for the sale of the delinquent property that best protect the financial interest of the delinquent property owner and meet the needs of local governments to collect delinquent property taxes due.

(3) The county governing body may authorize the auditor to combine for sale two or more contiguous parcels owned by the same party when:

(a) the parcels are a single economic or functional unit;

(b) the combined sale will best protect the financial interests of the delinquent property owner; and

(c) separate sales will reduce the economic value of the unit.

(4) The governing body may accept any of the following bids:

(a) the highest bid amount for the entire parcel of property, however, a bid may not be accepted for an amount which is insufficient to pay the taxes, penalties, interest, and administrative costs; or

(b) a bid in an amount sufficient to pay the taxes, penalties, interest, and administrative costs, for less than the entire parcel.

(i) The bid which shall be accepted shall be the bid of the bidder who will pay in cash the full amount of the taxes, penalties, interest, and administrative costs for the smallest portion of the entire parcel.

(ii) The county auditor at the tax sale or the county legislative body following the tax sale shall reject a bid to purchase a strip of property around the entire perimeter of the parcel, or a bid to purchase a strip of the parcel which would prevent access to the remainder of the parcel by the redemptive owner or otherwise unreasonably diminish the value of that remainder.

(iii) If the bid accepted is for less than the entire parcel, the auditor shall note the fact, with a description of the property covered by the bid, upon the tax sale record and the balance of the parcel not affected by the bid shall be considered to have been redeemed by the owner.

(5) The county legislative body may decide that none of the bids are acceptable.

(6) Once the county auditor has closed the sale of a particular parcel of property as a result of accepting a bid on the parcel, the successful bidder or purchaser of the property may not unilaterally rescind the bid. The county legislative body, after acceptance of a bid, may enforce the terms of the bid by obtaining a legal judgment against the purchaser in the amount of the bid, plus interest and attorney's fees.

(7) Any sale funds which are in excess of the amount required to satisfy the delinquent taxes, penalties, interest, and administrative costs of the delinquent property shall be treated as unclaimed property under Title 67, Chapter 4a, Unclaimed Property Act.

(8) All money received upon the sale of property made under this section shall be paid into the county treasury, and the treasurer shall settle with the taxing entities as provided in Section **59-2-1366**.

(9)(a) The county auditor shall, after acceptance by the county governing body, and in the name of the county, execute deeds conveying in fee simple all property sold at the public sale to the purchaser and attest this with the auditor's seal. Deeds issued by the county auditor under this section shall recite the following:

(i) the total amount of all the delinquent taxes, penalties, interest, and administrative costs which were paid in for the execution and delivery of the deed;

(ii) the year for which the property was assessed, the year the property became delinquent, and the year the property was subject to tax sale;

(iii) a full description of the property; and

(iv) the name of the grantee.

(b) When the deed is executed and delivered by the auditor, it shall be prima facie evidence of the regularity of all proceedings subsequent to the date the taxes initially became delinquent and of the conveyance of the property to the grantee in fee simple.

(c) The deed issued by the county auditor under this section shall be recorded by the county recorder.

(d) The fee for the recording shall be included in the administrative costs of the sale.

(e) The deed shall be substantially in the following form:

TAX DEED

___ County, a body corporate and politic of the state of Utah, grantor, hereby conveys to ___, grantee, of ___ the following described real estate in ___ County, Utah:

(Here describe the property conveyed)

This conveyance is made in consideration of payment by the grantee of $___, representing the total amount owing for delinquent taxes, penalties, interest, and administrative costs constituting a charge against the real property

for nonpayment of general taxes assessed against it for the years ___ through ___ in the sum of $___.

Dated ___ (month\day\year).

(Auditor's Seal)

County _____

By _____
County Auditor

STATEMENT OF THE CASE

This matter arose out of a tax sale conducted by Summit County on May 24, 2001. As a result of delinquent taxes, Summit County sold property owned by the Petitioner, Paul Trunnell, and identified as parcel number SS-75, for the sum of $31,000 to James and Connie Sorenson, the co-Respondents.

On June 14, 2001, after hearing an objection from Mr. Trunnell, the Summit County Board of County Commissioners ("BCC") ratified the tax sale and a tax deed was subsequently issued by the Auditor to the Respondents Sorenson for parcel SS-75.

On June 16, 2001, Mr. Trunnell filed his complaint in the district court of Utah seeking to set aside the tax sale among other claims, and naming Summit County and James and Connie Sorenson as defendants.

After discovery, the Parties' Cross Motions for Summary Judgment came before the trial court on August 15, 2002 (R. 1072-1158) at which time the trial court ruled in favor of Respondents Summit County and the Sorensons,

declaring the tax sale valid as a matter of law, and entering judgment on all claims in favor of Summit County and the Sorensons. A final Order was entered on September 13, 2002 (R. 1023-1029).

Mr. Trunnell appealed the order of the district court to the Utah Court of Appeals which heard the case on February 20, 2004. An unpublished Memorandum Decision was issued March 4, 2004 and is cited in the public domain as *Trunnell v. Summit County*, 2004 UT App 45. The decision of the Court of Appeals affirmed the grant of summary judgment by the trial court in all respects. Thereafter the petitioner sought a writ of certiorari from the Utah Supreme Court, which petition was denied on July 19, 2004. *Trunnell v. Summit Co.*, 94 P.3d 929 (UT 2004).

STATEMENT OF FACTS

1. Prior to May 24, 2001, Paul Trunnell was the owner of a single parcel of land consisting of 87.73 acres and located entirely within Summit County, Utah, with a Summit County tax identification of parcel number SS-75 (the "Property"). (R. 0002, 0497)

2. Commencing in 1996 and for a period of five (5) consecutive years, the taxes assessed on the Property were delinquent and went unpaid. (R. 0019)

3. On January 23, 2001, a delinquent tax billing statement was sent by the Summit County Treasurer to Paul Trunnell notifying him of the five (5) year tax delinquency for parcel SS-75 in the total amount of six thousand sixty-five dollars and forty-nine cents ($6,065.49) which sum was due in full on or before March 15, 2001. (R. 0019) This billing statement was not a notice of tax sale under Utah

law, and Respondent Summit County specifically objects to the petitioner's characterization of this billing statement as the official tax sale notice.

4. Paul Trunnell received the tax billing statement prior to March 15, 2001. (R. 0003, 0019, 1328)

5. No payment for delinquent taxes on the property was made prior to March 15, 2001. (R. 0003, 0019, 1328) Mr. Trunnell knew that the taxes were due, yet knowingly did not pay the taxes in a timely manner. (R. 1326, 1377)

6. The delinquent tax notice sent by the Summit County Treasurer in January 2001, contained an additional courtesy notice of the tax sale for those parcels with a five (5) year delinquency. However, the Auditor's office had not yet determined the exact date on which the 2001 annual tax sale would be held, so in the courtesy notice, the Treasurer estimated the date to be May 31, 2001. (R. 0152-0153)

7. Blake Frazier is the duly elected Summit County Auditor, charged with the task of performing tax sales pursuant to UTAH CODE ANN. §§ 59-2-1351 and 1351.1. (R. 0152)

8. In early April, 2001, the County Auditor, Blake Frazier, determined that the Summit County tax sale would be held on May 24, 2001. (R. 0153)

9. From April 28, 2001 through May 19, 2001, Blake Frazier published notice of the tax sale in *The Park Record*, a newspaper of general circulation within Summit County, for a period of four (4) weeks, and in the manner prescribed by UTAH CODE ANN. § 59-2-1351(2). (R. 0153, 0157)

10. On April 30, 2001, the Auditors office sent a Notice of Tax Sale on the Property to Paul Trunnell via certified and first class mail through the U.S. Postal Service as

required by Utah law. The return receipt for the Notice of Tax Sale was signed by the Petitioner's wife, Bobbi Trunnell with the return receipt postmarked for return to Blake Frazier on May 7, 2001. (R. 0153, 0169, 1367-1368)

11. On April 30, 2001, additional notifications were sent by the auditor to Paul J. Trunnell at P.O. Box 66, Heber City, Utah 84032 (returned undelivered). All other interested parties were sent notices including: Founders Title Company at P.O. Box 680845, Park City, Utah 84068 (signed for by Brian K. Peterson); O. Lamont & Shirley D. Heath, Equity Exchange, Inc. Employees Pension at P.O. Box 57588, Murray, Utah 84157 (returned undelivered); and Old Republic Title Company at P.O. Box 66, Heber City, Utah 84032 (returned undelivered). Finally, notice was sent to the occupant of the land, Park City Stone c/o Paul Trunnell, P.O. Box 1270, Midvale, Utah 84049 (signed for by Gary Campbell).

12. The Notice of Tax Sale sent to Paul Trunnell was in a form which complied with the requirements of UTAH CODE ANN. § 59-2-1351(3).

13. Sometime around May 15, 2001, Paul Trunnell telephoned Blake Frazier regarding the Notice of Tax Sale of the Property. Mr. Trunnell confirmed to Blake Frazier that he had received notice of the tax sale, and asked whether there was any way to postpone or cancel the sale with respect to the Property. Mr. Trunnell was informed that Summit County would postpone the tax sale if the property owner made a substantial payment on the delinquent taxes, and further agreed to pay the entire delinquent tax balance within 30 days. (R. 0003, 0154)

14. No payment for the delinquent taxes on the Property was received by Summit County from Mr. Trunnell or

any other person on his behalf, prior to May 24, 2001. (R. 0003, 1330-1331, 1343, 1391)

15. No redemption of the Property either partially or in whole, was made pursuant to Utah law prior to the tax sale on May 24, 2001 or prior to the ratification of the tax sale by the Summit County Board of County Commissioners on June 14, 2001.

16. On May 24, 2001, a tax sale of the Property was conducted as noticed. Connie Sorenson appeared and was the highest bidder on the Property and therefore, the Property was sold to Connie and James Sorenson in accordance with statutory requirements. (R. 0004).

17. On June 14, 2001, after hearing from Paul Trunnell and the Summit County Assessor and having received no proof of payment by Mr. Trunnell toward the delinquent taxes, the Summit County Board of County Commissioners ratified the sale of the Property to the Sorensons. (R. 0005-0006, 0114)

18. On or about June 15, 2001, a Tax Deed was issued by Summit County to James and Connie Sorenson as the record title holders of the Property. (R. 0116).

SUMMARY OF ARGUMENT

The Petitioner/Plaintiff, Mr. Trunnell, seeks review by this Court based upon an allegation that the decision of the Utah Court of Appeals, and subsequent denial of certiorari by the Utah Supreme Court, is in conflict with the due process requirements set forth in this Court's decision of *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706 (1983). It is the position of Summit County that the issues raised in the *Mennonite* decision and in this Petition, have been addressed by this

Court's subsequent decision of *Dusenbery v. U.S.*, 534 U.S. 161, 122 S.Ct. 694, 151 L.Ed.2d 597 (2002). The application of the rule of law regarding due process by the trial court and affirmation by the Utah Court of Appeals was correct.

The tax sale notification scheme set forth in the Utah Code, for property owners and all other parties interested in the real property to be sold, is designed to apprize all interested parties of the pendency of the tax sale of real property and to afford them an opportunity to present their objections to the sale. Summit County's strict compliance with the statutory notification requirements did not deprive the property owner, Mr. Trunnell, nor any other party with an interest in the property, including third party lienholders and occupants of the land, of due process and did not violate the constitutional protections afforded in the Due Process clause of the Fourteenth Amendment of the U.S. Constitution.

Further, Summit County's refusal to honor an oral agreement for which performance of a condition precedent was required by Mr. Trunnell, but not performed, did not deprive Mr. Trunnell of due process and did not violate the constitutional due process protections afforded in the Fifth and Fourteenth Amendments of the U.S. Constitution.

ARGUMENT

I. Due Process

Mr. Trunnell claims that the noticing provisions set forth in the Utah Code are violative of his due process rights unless the notice is actually received by the property

owner in a reasonable time prior to the sale, and unless there is a specified number of days prior to the sale for which notice must be published, the statute is invalid. Further, Mr. Trunnell argues that rather than sending notice by certified mail as prescribed, the notice must be sent via "restricted delivery" to the property owner; otherwise due process is violated.

The Due Process clause of the Fifth and Fourteenth Amendments to the U.S. Constitution, prohibit governments from taking citizens' property without "due process" of law. That term has been interpreted as giving individuals "'notice and an opportunity to be heard'". *Dusenbery v. U.S.*, 534 U.S. 161, 167, 151 L.Ed.2d 597, 122 S.Ct. 694 (2002) (*quoting U.S. v. James Daniel Good Real Property*, 510 U.S. 43, 48, 126 L.Ed.2d 490, 114 S.Ct. 492 (1993)).

This Court has articulated the standard by which claims of insufficient notice to a government's action shall be measured. That standard is notice which is "'reasonably calculated, under all the circumstances, to apprize the interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Dusenbery*, 534 U.S. at 168, 173 (*quoting Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15, 319, 94 L.Ed. 865, 70 S.Ct. 652 (1950)).

Thus, the question is not whether or not Mr. Trunnell personally received the notice or whether restricted delivery or actual personal notice (actual receipt of notice) should be required by the statute. Rather, the question is whether the notice required under Utah's statutory scheme is reasonably calculated to apprize Mr. Trunnell of the pending action, thus affording him reasonable time and opportunity to present objections to the sale.

In *Dusenbery*, this Court expressly rejected an argument similar to that of the Petitioner, when affirming the forfeiture of items seized during the execution of a criminal warrant. The government notified Mr. Dusenbery by sending written notice via certified mail to the correctional facility in which he was incarcerated. The mail was received by prison mail room staff, who signed the signature card. Following procedure, the employee entered the mail into a log book then had another staff member distribute the mail to the inmate. In addition to the certified mail to the correction facility, the government also sent written notice via certified mail to his last known address (the address where the search and seizure took place); and also an address in Ohio where his mother lived. The government also followed the statutory requirements by publishing the notice in a newspaper of general circulation in the district in which the forfeiture proceeding was brought, for a period of at least three successive weeks.

As in the instant case, the petitioner in *Dusenbery* argued that due process requires "actual notice" and (as in this case) cited the case of *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 796-797, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983) to support that claim. However, this Court rejected that argument stating that the *Mennonite* case stood for the proposition that the government is ***not*** required to "provide actual notice, but it must ***attempt*** to provide actual notice." *Dusenbery*, 534 U.S. at 170 [emphasis added]. This Court went further to say that "none of our cases . . . has required actual notice in proceedings such as this." *Id.*

The similarities between *Dusenbery* and this case are numerous. In the instant case, the government not only

sent notice to Mr. Trunnell at his last known address, which was received by his wife, the government also sent notice to several other addresses including a business address where too, the notice was received by Mr. Trunnell's business agent, Gary Campbell. (R. 0975-0981) As in *Dusenbery*, the government also published notice in a manner and for the duration required by law.

As for whether notice sent on April 30, 2001 was sufficiently timely to afford Mr. Trunnell the opportunity to be heard prior to or on May 24, 2001, the record shows that the notice was mailed and received in a timely manner. Mr. Trunnell's wife, Bobbi Trunnell received and signed for the notice sometime on or before May 7, 2001 (the date of the Idaho postmark on the return receipt). Mr. Trunnell thereafter called the Auditor on May 15, 2001, and talked of postponing the sale, thus indicating knowledge of the sale. Finally, the return receipt with Mrs. Trunnell's signature was postmarked for return to the County on May 7, 2001 and was received by the Auditor's office prior to the sale all indicating that the notice had been received in sufficient time prior to the sale and giving Mr. Trunnell notice and an opportunity to appear and present objections. (R. 0969, 1138-1139)

Looking at the totality of the circumstances, the notice in the instant case was reasonably calculated to notify Mr. Trunnell of the pending action, was an attempt by the County to provide actual notice, was given in a timely manner and Mr. Trunnell cannot show in what manner due process was violated. As a result, the trial court correctly ruled that there were no due process violations, which decision was upheld by the Utah Court of Appeals with certiorari denied by the Utah Supreme

Court. *Trunnell v. Summit County*, 2004 UT App 45, *cert. denied*, 94 P.3d 929 (2004).

II. Notice

The notification requirements set forth in UTAH CODE ANN. § 59-2-1351 (1953), establish three (3) pre-requisite duties which the auditor must meet prior to conducting a tax sale. First, the Auditor must send the Notice of Tax Sale by certified first class mail to the last-known recorded owner of the property, the occupant of any improved property, and "all other interests of record as of the preceding March 15, at their last known address". UTAH CODE ANN. § 59-2-1351(2)(a). Second, the notice must be published four times in a newspaper of general circulation within the county, at least one time in each of four successive weeks immediately preceding the date of the sale. UTAH CODE ANN. § 59-2-1351(2)(b). Third, the notice itself must be in a form substantially similar to that prescribed in the Utah Code. UTAH CODE ANN. § 59-2-1351(3). If these three requirements are strictly complied with, then under Utah law the sale of real property is valid as a matter of law. In his petition to this Court, Mr. Trunnell does not challenge the published notice or the form of the notice. He challenges only the personal or mailed notice to the property owner, the lienholder and the occupant of the land.

A. The personal notice to the property owner Mr. Trunnell, was proper

On April 30, 2001, the Notice of Tax Sale was sent by certified and first class mail to Paul Trunnell, who was the owner of the Property, with an address of 769 Lower Pack

River Road, Sandpoint, Idaho 83864-4992. The return receipt for the Notice of Tax Sale was signed by Bobbi Trunnell, who is Paul Trunnell's wife and with whom he resides. (R. 1320) After obtaining Mrs. Trunnell's signature, the return receipt was mailed back to Summit County with an Idaho postmark of May 7, 2001. On May 15, 2001, Paul Trunnell contacted the Summit County Auditor, Blake Frazier, by telephone, acknowledging that he knew of the forthcoming tax sale and asked for a continuance of the sale. (R. 0003, 0154)

Additional notifications were sent by the auditor to Paul J. Trunnell at P.O. Box 66, Heber City, Utah 84032 (returned undelivered); Founders Title Company at P.O. Box 680845, Park City, Utah 84068 (signed for by Brian K. Peterson); O. Lamont & Shirley D. Heath, Equity Exchange, Inc. Employees Pension at P.O. Box 57588, Murray, Utah 84157 (returned undelivered); Old Republic Title Company at P.O. Box 66, Heber City, Utah 84032 (returned undelivered); and the occupant of the land, Park City Stone c/o Paul Trunnell, P.O. Box 1270, Midvale, Utah 84049 (signed for by Gary Campbell).

All statutory notification requirements were met by Summit County. Although Mr. Trunnell contends that he did not personally receive the notice sent on April 30, 2001 to the address in Sandpoint, Idaho and signed for by his wife, Bobbi Trunnell prior to the sale, this contention without merit since "actual receipt" is not required under the law. All that is required is that the Notice be sent via U.S. first class and certified mail to the last known address. UTAH CODE ANN. § 59-2-1351(2)(a). Mr. Trunnell acknowledges receipt of the January 23, 2001 Tax Billing at the address in Sandpoint, Idaho. As the last known address, this address was used to send the Notice of Tax

Sale by the Summit County Auditor. Bobbi Trunnell, the Appellant's wife with whom he resides, received the notice and the receipt with her signature was returned to the County all prior to the tax sale. (R. 1111) Having had sufficient time in which to receive the Notice, sign for it and have the return receipt received back by Summit County, the statutory provisions of personal notice were met and the trial court correctly ruled that the notice was sufficient as a matter of law, and that Mr. Trunnell had personal notice as a matter of law. (R. 1060).

B. The personal notice to third party lienholders was proper

In another effort to overcome the validity of the tax sale, Mr. Trunnell attempts to challenge the notice sent to a secured creditor and lienholder of the property who was not a party to the action in the trial court. Although the lienholder has not challenged the noticing (*see* R. 0697-0699). Mr. Trunnell nevertheless attempts to do so. Summit County asserted before the trial court and appellate court, that Mr. Trunnell has no standing to challenge the notice to the lienholder and maintains that argument. (R. 1135-1136) The lienholder was not made a party to the proceedings below and unless Mr. Trunnell demonstrates affirmatively why he has standing to challenge the notice, Summit County continues to assert that Mr. Trunnell lacks standing to make this claim.

> "It is the burden of the 'party who seeks the exercise of jurisdiction in his favor' [to clearly allege] facts essential to show jurisdiction. If [it] fails to make the necessary allegations, [it has] no standing" *FW/PBS, Inc. v. City of Dallas*, 493 U.S.

> 215, 231, 110 S.Ct. 596, 608, 107 L.Ed.2d 603 (1990) (citations omitted).

Midvale City Corp. v. Haltom, 2003 UT 26, P12, 2003 Utah LEXIS 55.

> [O]ne does not have standing to assert a violation of rights belonging to another, since the person entitled to a right is the only one who can be directly injured by its deprivation. See *Warth*, 422 U.S. at 499 [*Warth v. Seldin*, 422 U.S. 490, 501, 45 L.Ed.2d 343, 95 S.Ct. 2197 (1975)] (a litigant "must assert his own legal rights"); *Barrows v. Jackson*, 346 U.S. 249, 255, 97 L.Ed. 1586, 73 S.Ct. 1031 (1953).

Doyle v. Oklahoma Bar Ass'n, 998 F.2d 1559, 1566 (10th Cir. 1993).

In the event a 3rd party challenge can be made to the notice given to the lienholder, it is clear that the notice to the lienholder, Equity Exchange Inc. Employee's Pension Trust (hereinafter "Heath Trust"), was sufficient and that the provisions of the statute were strictly followed. As with notice to Mr. Trunnell, actual notice to the Heath Trust is not required and the claim, therefore, must fail. Rather, it is notice sent pursuant to the statutory provisions that is required which provisions were met by Summit County.

The notice of tax sale was sent to the last known address of the Heath Trust. (R. 1001-1007) The notice was returned to the County undelivered based upon the death of the Trustee and subsequent closure of the known post office box with no forwarding address. (R. 1007, 1119) Further, notice was published pursuant to UTAH CODE ANN. § 59-2-1351(2). Actual notice to the trust was not required, rather, the notice must be reasonably calculated

to apprize the Heath Trust of the pending action and afford them an opportunity to respond. *Dusenbery*, 534 U.S. at 168. Given the efforts made and use of more than one noticing provisions, the notice to the Heath Trust was reasonably calculated to notify them of the pending action and it can be said that Summit County did everything in it's power to apprize the Heath Trust of the impending sale.

Further, when addressing the issue of notification to creditors before a tax sale, the Utah Supreme Court in *Hall v. NACM Intermountain, Inc.*, 1999 UT 97, P13, 988 P.2d 942, 946 stated: " . . . parties who fail to take the steps necessary for receiving notice waive their constitutional protection and are not entitled to notice [citations omitted]." Thus, creditors such as the Heath Trust, must record and keep their contact information current with the County if they expect to be notified of tax sale proceedings or other proceedings on the property. The fact that the Trustee had recently passed away and his daughter had closed the post office box listed as the official address on all county records, and had not recorded or given notice of any forwarding address would not be known to the County. (R. 1119) The Auditor is obligated to notify the creditors at the address on the recorded documents and it is undisputed that such notification was sent via certified mail and although the notice was returned without any forwarding information, the statutory obligation of the Auditor was fulfilled. Additionally, the posted and published notice were sufficient to put any successor in interest of the Heath Trust on notice of the tax sale. *Id.*

C. The personal notice to the occupant of the property was proper

Appellant, Mr. Trunnell, asserts that the notice given to the occupant of the land, Park City Stone, was somehow deficient. Although Mr. Trunnell acknowledges that notice was sent in the form prescribed by law prior to the sale, and acknowledges that the occupant Park City Stone actually received the notice prior to the sale, Mr. Trunnell nonetheless argues that the occupant's receipt of the notice twenty-three days prior to the sale renders the sale invalid. (R. 1389-1390) This argument is without merit.

> [A claimant's] receipt of actual notice deprives him of standing to raise the claim [of a due process violation] . . . Having received such notice, [a claimant] has clearly been accorded due process in the application of the statute as to him personally.

Wiren v. Eide, 542 F.2d 757, 762 (9th Cir. 1976).

Notice was sent to the Appellant, Mr. Trunnell, in care of the occupant Park City Stone. The notice was actually received by Mr. Trunnell's business agent, Gary Campbell, (R. 1368-1369) prior to the sale, thus giving both Mr. Trunnell and the occupant actual notice of the sale, prior to the sale. (R. 1389-1390) The fact that Appellant now asserts that receiving actual notice of the sale twenty-three days prior to the sale is somehow deficient is contrary to law and without merit. The occupant, Park City Stone was afforded all due process considerations required by law and was given notice prior to the sale of the impending action with all opportunities to be heard.

III. Oral Agreement

The refusal of Summit County to honor an oral agreement after the condition precedent was not performed by the Petitioner/Plaintiff does not violate due process when the law on contracts is correctly stated and applied.

The trial court, after briefing and argument by counsel, found that Mr. Trunnell failed to perform his end of the oral agreement which was a condition precedent to the contract, thereby relieving Summit County of any duty to perform under the agreement. (Petitioner's Brief, Appendix at page a16). The trial court also rejected the equitable claims of Mr. Trunnell regarding the agreement. (Petitioner's Brief, Appendix at page a16).

On appeal to the Utah Court of Appeals, the appellate court found that the ruling of the trial court regarding the oral contract was correct. (Petitioner's Brief, Appendix at page a7).

The findings and application of the law on oral contracts was correct and as such the Utah Supreme Court denied the petition for certiorari. The correct application of the properly articulated law, does not provide a basis for this Court, in its discretion, to grant certiorari.

CONCLUSION

There is no basis for a Writ of Certiorari to issue from this Court. The issues are neither those of first impression, nor are they unique. The decision of the Utah Court of Appeals is not in conflict with any previous decision of any court, and has not deviated from any acceptable

standards or practices. Further, there is no error of law which would support the issuance of a Writ of Certiorari.

The tax sale held by Summit County on May 24, 2001 was valid as a matter of law. The notice which was both published pursuant to law, and which was sent via certified mail to the Petitioner, pursuant to law, was reasonably calculated to apprize Mr. Trunnell and all creditors or other interested parties of the pending action and afford them an opportunity to be heard.

The oral contract between Mr. Trunnell and Summit County is unenforceable as a matter of law. The failure of the Petitioner to perform under the contract excused Summit County from performing their obligation and continuing the tax sale.

Having no violations of due process or other basis on which this Court in its discretion should support the issuance of a Writ of Certiorari, the Petition of Mr. Trunnell should be denied.

RESPECTFULLY SUBMITTED this 19th day of November, 2004.

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